

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF sections 38 to 48 of the *Environmental Bill of Rights*, S.O. 1993, c.28 and section 34 of the *Ontario Water Resources Act*, R.S.O. 1990, C.0.40;

AND IN THE MATTER OF an application by Friends of Rural Communities and the Environment, pursuant to section 38 of the *Environmental Bill of Rights*, S.O. 1993, c. 28 for leave to appeal the decision of the Director, Ministry of the Environment, pursuant to section 34 of the *Ontario Water Resources Act*, to issue Permit to Take Water 8461-7CFLGS, dated July 8, 2008, to St. Marys Cement Inc. (Canada) authorizing pumping tests at bedrock well TW14 located at Lot 3, Concession II, East Flamborough, Hamilton, with EBR Registry Number: IA06E1293.

FRIENDS OF RURAL COMMUNITIES AND THE ENVIRONMENT

-and-

DIRECTOR, MINISTRY OF THE ENVIRONMENT

**ST MARYS CEMENT SUBMISSIONS REGARDING THE TRIBUNAL'S
JURISDICTION**

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INTRODUCTION

1. Friends of Rural Communities and the Environment ("FORCE") seek leave to appeal, under section 38 of the *Environmental Bill of Rights, 1993* ("EBR"), a temporary Permit to Take Water 8461-7CFLGS issued by the Director under section 34 of the *Ontario Water Resources Act* ("OWRA") to St. Marys Cement Inc. (Canada) ("St. Marys"). By letter dated July 18, 2008, the Environmental Review Tribunal ("the Tribunal") requested submissions from the parties as to whether the temporary permit is a Class 1 instrument under the EBR, and therefore whether the Tribunal has jurisdiction to consider the leave to appeal application.

2. St. Marys has had the opportunity to review the submissions of the Director on July 30, 2008, and concurs in its entirety with both the factual background and legal submissions of the Director.

PRELIMINARY MATTER

3. As a preliminary matter, St. Marys objects to counsel for FORCE having prematurely filed its Leave to Appeal application materials and then referring to those materials in its July 25, 2008 submission on jurisdiction (see references to "Supplementary Application" throughout the FORCE submission). FORCE has retained experienced environmental counsel in this matter, who undoubtedly knows and understands fully the procedures before the Tribunal. Referring to such Leave for Appeal materials is premature and irrelevant to the issue of whether the Tribunal has jurisdiction to consider the Leave to Appeal application. Counsel for FORCE respectfully ought to have provided as separate exhibits any materials in support of their submission on the jurisdiction issue, as in the normal course.

4. St. Marys respectfully submits that the Tribunal should not review the Leave to Appeal materials, including the Supplementary Application document, should not use or refer to any references thereto in its Decision, and should consider confirmation of that approach in its Decision on the jurisdiction issue.

FACTUAL BACKGROUND – SUPPLEMENTARY SUBMISSIONS

5. In regard to the Factual Background of the Director’s Submission, St. Marys would add the following:
 - (a) It should be noted that FORCE relies solely on two administrative oversights in the use of the standard templates used by the Ministry for its position that the posting of the proposal on the Environmental Registry created a Class 1 instrument. These oversights were indeed unfortunate and the Director recognizes that fact in his submission. St. Marys would note that, despite the numerous meetings, presentations, and correspondence with the stakeholders on this proposal, FORCE presents no other evidence of any statement, and no evidence of any intentional statement, by the Ministry or St. Marys to the effect that St. Marys’ proposal for a temporary permit to take water (the “Proposal”) is a Class 1 instrument.
 - (b) To the contrary, St. Marys would submit that there have been numerous instances when the Ministry and St. Marys informed the stakeholders that the Proposal was not a Class 1 instrument. For example, St Marys held a public meeting at Our Lady of Mount Carmel Catholic Elementary School on April 16, 2008. The sole purpose of the meeting was to provide the public with more information about the Proposal, the proposed pumping test and the well monitoring measures. At the meeting, the Ministry stated that the Proposal was not a Class 1 instrument and therefore no appeal provisions exist.
 - (c) In regard to the testing program for the groundwater recirculation system (“GRS”), St. Marys submits that it is important to recognize that the GRS

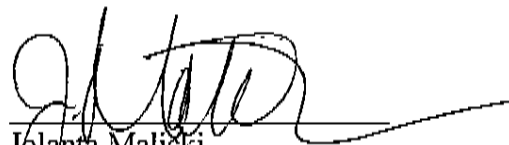
is a mitigation option for the dewatering that must be verified by specific site testing. The testing program is in three phases. The Phase 1 testing program being undertaken is intended to provide a baseline response to pumping, which will be used to evaluate the effectiveness of the Phase 2 and Phase 3 groundwater recirculation system(s) in maintaining groundwater levels along the perimeter of the property and within the wetland to the north of the test site. The results of the testing program will be used to calibrate a groundwater flow model, which is to be employed to scale up the GRS from the initial demonstration project to the full quarry if the GRS is determined to be a suitable option. The testing program was specifically requested by various stakeholders, as a means of establishing that the GRS technology can be applied at the Flamborough property. If the testing program shows that the GRS is not ideally suited for the site conditions, then this testing for the purposes of the GRS option will be at an end. If an alternative mitigation option is later pursued, and additional permitting is required, appropriate approvals would be addressed at that time but it is not a certainty now that additional permits will be required.

- (d) FORCE alleges that the 357 day window is not sufficient for St. Marys to complete the testing. Respectfully, St. Marys submits that this is not a relevant ground for determining whether the Tribunal has jurisdiction to hear FORCE's leave for appeal. Neither FORCE nor the Tribunal have the specified knowledge or expertise to review the appropriate length of time for which the Ministry ought to have issued a temporary permit to take water. The Ministry gave the public an opportunity to provide comments prior to its decision and took FORCE's and other stakeholders' comments on such issues into consideration in making its decision. In any event, St. Marys has reviewed the timetable providing for the conduct of 6-day to 8-day pumping tests in three phases, with the necessary review time between each phase, and has no reason to believe that it cannot be met. Pumping tests are routinely conducted to assess the properties of an aquifer and to evaluate the effects/impacts associated with a development

such as a quarry or a water supply. St. Marys understands that the normal practice is that a report is prepared that documents the testing results and said report is submitted to the MOE for consideration. MOE staff engaged in this project are fully conversant with the proposed undertaking and have the necessary technical expertise to review and comment on the findings. Unlike most pumping test programs of this nature, MOE staff was present during each day of the testing program and received daily progress reports. Therefore reporting periods of 30 to 60 days are sufficient between each phases, given that it is solely in the Director's control to approve Phases 2 and 3. Indeed, Phase 1 pumping is now completed on schedule and without difficulty, contrary to the allegations in FORCE's submission at paragraph 53.

- (e) St. Marys' decision to proceed with Phase 1 testing in July of 2008 was necessary to allow for the completion of a second test (in October or early November) prior to the onset of winter and the third test in the spring or early summer of 2009 (May or early June). To meet the approved timetable, i.e., to allow for additional testing in 2008 and to accommodate the necessary consultation and Ministry review, it was considered prudent to undertake the initial testing phase as soon as practical. Another consideration in the July testing relates to the availability of staff to complete the work, in a time when such resources conflict with other commitments, both personal and professional. A later startup in late summer or early September would not have allowed completion of the second phase in 2008.
- (g) As noted, the Phase 1 testing program has been completed without difficulty and on schedule, with no interference with existing residential use of groundwater from the aquifer on a preliminary review. The effects of the pumping were contained within approximately 400 metres of the test site. Given that the pumping rate during Phase 2 and Phase 3 will be similar, the effects of this pumping will likely be similarly contained on St. Marys property.

Dated at Toronto, this 30th day of July, 2008.



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